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Receivables Financing and the Conflict of Laws: The UNCITRAL Draft Convention on the Assignment of Receivables in International Trade

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> *In a country a great part of whose commercial capital is employed abroad, it is particularly proper that such capital over which the trader has disposing power although situated out of the Kingdom, should be considered as referable to the domicilium of the owner.*[1]

I. Introduction

Private international law solutions to legal problems created by differences among legal systems are often distrusted. Instead of a substantive solution, a choice of law rule merely provides a signpost —and not always a clear one—to the source where the solution may be found. Moreover, a solution incubated in a domestic factual

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1. Philips v. Hunter (1795) 2 G, Blackst., 402, 406, as quoted by MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 510-511 (2d ed. Oxford: Clarendon, 1950).

and legal context may not prove appropriate or workable beyond local borders.

Distrust of private international law is matched by distrust of the private international lawyer. Although considered a speciality in itself, private international law covers the entire spectrum of private law. As such, it requires the skills of the generalist. Yet a generalist may not be sufficiently attuned to the practical contexts in which a conflicts rule must operate to recognize when a theoretically defensible solution may turn out to be unworkable. On the other hand, to leave the matter exclusively to the substantive law specialist risks undermining carefully cultivated general conflicts norms.

In the area of assignment[2] of receivables, the challenges are particularly fearsome.[3] The assignment matrix is a complex one, involving not one but two sets of contractual relations; the original contract between the assignor and debtor which generates the assigned receivable and the contract between the assignor and assignee by which the assignment of that receivable is accomplished.

From a choice of law perspective, the original contract and the contract of assignment are sufficiently independent to justify subjecting each to its own proper law. But what of the impact of the assignment on the debtor? Should this be governed by the proper law of the contract of assignment or the original contract? Is a contract-based choice of law approach even appropriate? Consensus, after all, is the essence of contract, and the assignee/

2. In this paper, the term "assignment" is used in the same broad way as in the Draft Convention; it covers both the outright transfer or sale of receivables, and the creation of rights in receivables as security for debt (article 2(a)). At the conflict of laws level, there is no rational reason to distinguish between the two types of transactions. Indeed, such a distinction would make the conflicts regime unworkable. See further the discussion later in the text under the sub-heading "Characterization of assignments as sale or security."

3. On choice of law for assignment, *see*, in particular Henri Batiffol, *Assignment (Cession de créance) in* LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS (delivered at the Summer Institute on International and Comparative Law, University of Michigan Law School, August 5-20, 1949) (Buffalo: William S. Hein, 1982); ROY GOODE, COMMERCIAL LAW 1107-1130, especially 1126-1130 (2d ed. London: Sweet & Maxwell, 1995); Mark Moshinksy, *The Assignment of Debt in the Conflict of Laws* 109 L.Q.R. 591 (1992); Teun H.D. Struycken, *The Proprietary Aspects of International Assignments and the Rome Convention, Article 12,* L.M.C.L.Q. 345 (1998); MARTIN WOLFF, PRIVATE INTERNATIONAL LAW 502-576 (2d ed. Oxford: Clarendon, 1950); Note, 67 YALE L.J. 402 (1958).

debtor relationship is typically an involuntary one from the debtor's perspective.

The dual juridical nature of the assigned debt adds a further layer of complexity. From the perspective of the debtor/assignor relationship, the debt is purely a personal obligation—the debtor's creditor does not own the debt, the creditor is owed it. But it becomes a species of property when the original creditor assigns the right to payment to another.[4] As with any contract involving the divestment of property rights in favour of another, competing third party claimants may enter the picture: the recipient of a competing assignment, attaching creditors of the assignor, or the assignor's insolvency administrator. This makes a contractual approach inappropriate because freedom of contract ends where third party rights begin both in substantive law and in the conflict of laws. Yet solutions drawn from choice of law for property, where the *lex situs* dominates, are not readily transplanted to a right which lacks a corporeal object, and therefore a physical situs.

Early conflicts analysts sought to impose simplicity on this web of complexity through a unitary choice of law rule. Drawing on the medieval continental maxims *mobilia sequuntur personam* (movables follow the person), and *mobilia ossibus inhaerent* (movables inhere in the bones), they advocated application of the law of the domicile of the assignor, as the original "owner" of the debt.[5] For reasons which will emerge, the assignor's location is enjoying a deserved revitalization as the paramount connecting factor for the choice of law to govern assignments of receivables. But as the exclusive connecting factor for all issues, it insufficiently respects

4. I am using the concept of property (*propriété*) here in the comprehensive sense of English and French law. Some legal traditions restrict the equivalent term to rights in land and corporeal and quasi-corporeal movables, finding jurisprudential difficulty in assigning the status of a right *in re* to a right which has no object independent of the personal relationship of obligation which generates it: *see* Wolfgang Mincke, *Property: Assets or Power? Objects or Relations as the Substrata of Property Rights* 78-88 *in* PROPERTY PROBLEMS: FROM GENES TO PENSION FUNDS (J.W. Harris, ed., Kluwer Law International, 1997). While it is everywhere recognized that the creditor is enriched by another's indebtedness, and that the value of that debt must be to some degree transferrable, conceptual differences in the characterization of an assigned debt have contributed to difficulties in achieving international consensus in the conflict of laws rules applicable to assignment: *see, e.g.,* WOLFF, *supra* note 3, at 537,539.

5. *See* WOLFF, *supra* note 3, at 539-40; *see also* Moshinsky, *supra* note 3, at 591 (citing Joseph Story, *Commentaries on the Conflict of Laws* (1834) in footnote 2). This choice of law approach is reflected in the quote from the 1795 English decision in *Phillips v. Hunter*, *supra* note 1, which precedes the text of this article.

the debtor's interests and imposes unnecessary restrictions on freedom of contract between the assignor and assignee.

Later writers advocated a more pluralistic approach in which the different issues that may arise within the assignment matrix are each assigned the connecting factor for choice of law most appropriate for that issue.[6] While a pluralistic approach has attracted wide support, consensus on which issues should be assigned to what law has proved frustratingly elusive. It is no exaggeration to say that the area continues to be the most confused and confusing in the conflict of laws regimes of legal systems everywhere.[7]

The bifurcated rule in Article 12 of the *European Convention on the Law Applicable to Contractual Obligations* ("Rome Convention"), initially seemed to promise the beginning of international consensus.[8] Paragraph 12(1) refers the mutual obligations of the assignor and assignee to the proper law of the contract between them,[9] while paragraph 12(2) refers issues relating to the impact of the assignment on the debtor to the "law governing the receivable."[10]

However, article 12 has proved to be more a vehicle for disharmony than harmony. There is little agreement not just among, but even within, Rome Convention states on its meaning and scope. The major source of contention is whether article 12 applies to the property effects of assignments and the assignee's priority status against third parties, and, if so, which of its two branches contains the appropriate rule.[11] On its face, article 12 does not explicitly address either issue. However, some regard article

6. In the English conflict of laws, this approach is associated with the late Dr. John Morris *circa* 1949: *see* Moshinsky, *supra* note 3, at 592.

7. *See, e.g.*, Struycken, *supra* note 3, at 345 ("The assignment of debts belongs to the most hazardous areas of private international law."); *see also* Moshinsky, *supra* note 3, at 59 ("The assignment of intangible things, such as debts, has long been one of the most intractable topics in the English conflict of laws. The writers on the subject are fundamentally divided and the little case law that exists is old, confused and inconclusive.").

8. *See generally* Giuliano & Lagarde, *Report on the Convention on the Law Applicable to Contractual Obligations* 1980 O.J. (C282) (October 31, 1980).

9. 12(1): "The mutual obligations of assignor and assignee under a voluntary assignment of a right against another person ('the debtor') shall be governed by the law which under this Convention applies to the contract between the assignor and assignee."

10. 12(2): "The law governing the right to which the assignment relates shall determine its assignability, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor and any question whether the debtor's obligations have been discharged."

11. *See* Struycken, *supra* note 3, at 348-49.

12(1), insofar as it refers "the mutual obligations of the assignor and assignee" to the proper law of the contract between them, as thereby also determinative of the law applicable to the relative property rights acquired by subsequent third parties claiming through the assignor.[12] Others believe that article 12(2), insofar as it addresses issues of assignability and the assignee's right to payment from the debtor, as also determinative of priority among several assignees.[13]

Disharmony in choice of law for assignment frustrates both commercial and conflicts values.[14] Conflicts values favouring uniformity of result in transnational litigation are defeated because the applicable law will vary depending on the forum of litigation.[15] And commercial values are undermined because the relevant actors, not being able to predict with certainty where future litigation concerning the assignment may take place, cannot predict which state's choice of law rule will control. Consequently, they must structure the transaction to conform to the substantive laws of all potentially connected jurisdictions, a burden which inevitably restricts access to financing, and increases its cost.

In hindsight, it may have been a mistake to bring unification of the conflicts rules for assignment within the scope of the Rome Convention. A project devoted to choice of law for contracts in general was unlikely to deal adequately or appropriately with a species of contract in which the proprietary issues predominate, both legally and from a commercial risk assessment perspective.

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12. This interpretation has been endorsed by the highest court in the Netherlands: Brandsma q.q. v. Hansa Chemie AG, HR, May 16, 1997, Rechtspraak van de Week 126, as cited and summarized by Struycken, *supra* note 3.

13. This interpretation has been endorsed by the highest German court: BGH 8.12.1998, XI ZR 302/97 (WM 1999, 126 = ZIP 1999, 101 = NJW 1999, 940 (on file with author); *see* Struycken, *supra* note 3, at 349.

14. *See* Note, *supra* note 3, at 421-22.

15. Uniformity of result as a paramount value is contentious in the conflicts scholarship. If a *lis* is connected sufficiently to a state to justify adjudication there, why should that state's ideas of substantive justice not also control the selection of the most appropriate law to govern? For a recent discussion, *see, e.g.*, Catherine Walsh, *Territoriality and Choice of Law in the Supreme Court of Canada: Applications in Products Liability Claims* 76 CAN. BAR. REV. 91-129 (1997), *republished in* NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL AND CONSUMER LAW 237-272 (Jacob S. Ziegel & Shalom Lerner, eds. Oxford: Hart, 1998). Whatever the relevance of that debate in other areas, notably tort, surely substantive justice equates with uniform choice of law in the commercial receivables financing sphere, in view of the deleterious impact of disharmony on the cost and availability of credit and capital.

Now comes the *Draft United Nations Commission on International Trade Law* ("UNCITRAL") *Convention on the Assignment of Receivables in International Trade* ("Convention" or "UNCITRAL Convention"), approved by the Commission at its 2001 annual Session and submitted to the General Assembly for adoption as a United Nations Convention, a process which is expected by be concluded by the end of 2001.[16] The bulk of the Convention is devoted to stating international substantive rules for assignments within its scope. However, it adopts a choice of law solution for the critical issue of the priority of the assignee's right in the assigned receivable against competing claimants.[17] In addition, Chapter V incorporates a more comprehensive "mini-convention" on the choice of law rules for receivables financing. With some important refinements discussed later, Chapter V follows article 12 of the Rome Convention on the appropriate law to govern assignor/assignee and assignee/debtor relations, with the former governed by the proper law of the contract of assignment,[18] and the latter by the law governing the original contract which generated the receivable.[19] However, parallelling the choice of law rule in the main text of the Convention, Chapter V adopts a separate connecting factor for priorities—the law of the assignor's location.[20] It also states a specialized rule for the law applicable to the form of a contract of assignment which is compatible with the general Rome Convention rule on contract formalities.[21]

This paper presents a general overview of the conflicts rules incorporated into the Draft Convention and their justifications. In general, it will be seen that the regime promises to bring a welcome level of appropriate order to an area of private international law badly in need of it. As such, it demonstrates the happy results of marrying general conflicts analysis with substantive commercial law expertise. However, several problem areas are identified where application of the rules will require a practised hand, or where Contracting States may need to adjust aspects of their existing

16. *See Report of the United Nations Commission on International Trade Law on its thirty-fourth session, 25 June-13 July 2001*, Doc. A/56/17, p.38 para 200. The text of the *Draft Convention* appears in annex 1 of the *Report* To view or print the *Report* or annex, go to the UNCITRAL web site at www.uncitral.org and follow the links to the 34th Annual Session of the Commission.

17. UNCITRAL Convention article 22.

18. UNCITRAL Convention article 28.

19. UNCITRAL Convention article 29.

20. UNCITRAL Convention article 30.

21. UNCITRAL Convention article 27.

national law regimes if the intended goals of enhanced certainty and predictability are to be realized.

II. Scope of Application of the Conflicts Rules of the Convention

Before analysing the choice of law rules established in the Convention, it is important to understand the differences in the scope of application of the choice of law rule for priority in article 22 of the main text of the Convention and the more comprehensive conflicts "mini-convention" found in Chapter V.

The choice of law rule for priority in article 22 applies to all assignments which come within the general scope of application of the Convention. For the Convention to apply, an assignment must first satisfy the criteria for "internationality." Internationality exists if either the assignment is international—i.e. the assignor and the assignee are located in different States—or the assigned receivable is international—i.e. the assignor and the debtor on the assigned receivable are located in different states.[22]

Even if an assignment qualifies under these criteria, the Convention applies generally only if the assignor is located in a Contracting State.[23] There is one further territorial qualification. This relates to those provisions of the Convention which affect the debtor's rights and obligations. These provisions remain inapplicable, even if the assignor is located in a Contracting State, unless the debtor is also located in a Contracting State, or the law governing the original contract between the assignor and debtor is the law of a Contracting State.[24]

It bears emphasizing that the threshold requirement for internationality does not mean that assignees under a purely domestic assignment can safely ignore the Convention. First, the Convention, including the choice of law rule for priority in article 22, extends to subsequent sub-assignments, if any prior assignment is governed by the Convention, and to subsequent sub-assignments to which the Convention applies even if it did not independently apply to a prior assignment of the same receivable.[25] Second, the choice of law rule for priority in article 22 applies to any dispute between the right of an assignee under an assignment governed by the Convention and a competing claimant. Competing claimant for this purpose is defined to include, in addition to the assignor's

22. UNCITRAL Convention article 3.
23. UNCITRAL Convention article 1.1(a).
24. UNCITRAL Convention article 1.3.
25. UNCITRAL Convention articles 1.1(b) and 1.2.

creditors and insolvency administrator, another assignee of the same receivable from the same assignor, even if the assignment under which the competing assignee claims does not independently satisfy the criteria for internationality.[26] The definition also includes a claimant who asserts a right in the receivable by operation of law by virtue of having a prior right in an asset which generated the assigned receivable.[27] This latter category is meant to recognize that under some national laws, a claimant may have a right to receivables as proceeds of a security right in other assets which have been disposed of by the debtor; in effect these legal systems effect an automatic assignment of all proceeds, including receivables, generated by the debtor's disposition of property in which the claimant initially held security.[28]

Application of the more comprehensive "mini-convention" in Chapter V is likewise limited to assignments that satisfy the Convention's criteria of "internationality."[29] However, the role of Chapter V varies depending on whether or not the assignment falls within the direct scope of the Convention under the criteria just outlined.[30]

For assignments within the direct scope of the Convention, Chapter V plays only a supplementary or "gap filling" role.[31] It operates to designate the law applicable to those matters for which the main body of the Convention does not supply a direct solution, either expressly or by appealing to the general principles on which it is based.[32] The main body of the Convention provides a substantive rule for most important issues that might arise between the assignor and the assignee,[33] or between the assignee and the debtor,[34] and, for issues of priority, there is the independently applicable choice of law rule for priority in article 22.

26. UNCITRAL Convention article 5(m)(i).
27. UNCITRAL Convention article 5(m)(i).
28. An automatic statutory security right in the identifiable proceeds of a disposition or dealing in the property originally charged with security is primarily associated with the secured transactions regimes established by Article 9 of the Uniform Commercial Code (U.C.C.) in the United States and by the Personal Property Security Acts (PPSAs) enacted by Canada's common law provinces and three federal territories. *See* U.C.C. revised Article § 9-315(2); and, for the PPSAs, *see, e.g.*, Ontario PPSA section 25(1)(b), section 1(definition of proceeds).
29. UNCITRAL Convention articles 1.1(a), 1.4, 26.
30. UNCITRAL Convention article 26.
31. UNCITRAL Convention article 26(b).
32. UNCITRAL Convention articles 26(b) and 7.2.
33. UNCITRAL Convention *see* primarily Chapter III; Chapter IV, Section I.
34. UNCITRAL Convention *see* primarily Chapter IV, Section II.

Consequently, Chapter V will play only a limited role in the case of assignments within the direct scope of the Convention.

However, it may happen that litigation involving an assignment which satisfies the criteria of internationality is heard in a contracting State but the application of the Convention is not triggered. It follows from the scope criteria summarized above that this may occur whenever the assignee, but not the assignor, is located in a Contracting State, or whenever the litigation relates to the debtor's rights and obligations, and the debtor is not located in a Contracting State nor is the original contract governed by the law of a Contracting State. In such cases, Chapter V is meant to add an additional layer of international harmony by providing an independently applicable uniform conflicts regime (albeit one subject to an opt-out by Contracting States) to determine the applicable law.[35]

III. Choice of Law for Priority

A. Introduction: Why not a uniform substantive law solution?

As the experience under the Rome Convention attests,[36] the most controversial choice of law issue in the area of assignment concerns the appropriate law to govern the priority of the assignee's interest against competing assignees and the assignor's creditors or insolvency administrator. Not surprisingly, priority is also the issue on which there is the greatest range of difference among legal systems at the substantive level. All systems adopt a first-in-time rule, at least as a starting point, but differ on the relevant event.[37]

In some systems, priority turns simply on when the first assignee reached agreement with the assignor.[38] This is based on pure property doctrine: after the assignor's rights are vested in the assignee under the first assignment, there is nothing left that the assignor can transfer or that the assignor's creditors or insolvency administrator can attach. However, uniformity even among states

35. UNCITRAL Convention articles 26(a), 1.4.

36. *See supra* text beginning at note 8.

37. *See generally* Hein Kötz, *Rights of Third Parties: Third Party Beneficiaries and Assignment*, Chap 13, Vol VII 93-99, *in* INTERNATIONAL ENCYCLOPEDIA OF COMPARATIVE LAW (J.C.B. Mohr (Paul Siebeck),Tübingen,and Martinus Nijhoff, Dorderecht, Boston, Lancaster: 1990); *see also* SECURITY ON MOVABLE PROPERTY AND RECEIVABLES IN EUROPE: THE PRINCIPAL FORMS OF SECURITY IN THE EUROPEAN COMMUNITY EXCEPT GREECE AND SWITZERLAND (Michael G. Dickson et al. eds., Oxford: ESC Publishing Limited, 1988).

38. *See* Kötz, *supra* note 37, at 97. This rule is associated with German, Austrian and Swiss law.

adopting this technique is undercut by non-uniform exceptions. Some regimes, for instance, impose special additional requirements in the case of assignments for security purposes.[39] In others, the prominent example being German law, a first-in-time bank-assignee of a general bulk assignment may be subordinated to a subsequent inventory supplier who takes an assignment of the receivables arising on the assignor's authorized resale of the inventory.[40]

In other systems, an assignment is not effective against third parties until the debtor is either notified of or accepts the assignment, and the first assignee to give notice prevails.[41] The notification theory of priority is justified on two complementary rationales: notice to the debtor is the closest functional equivalent for intangibles to the general rule that title to tangible goods passes on physical delivery; and the rule enables a prospective assignee or interested creditor to assess their priority risk by inquiry of debtor as to whether there have been any previous notices.[42] Again, however, systems that agree on this general rule do not necessarily agree on the appropriate exceptions,[43] or some have legislated

39. *E.g.*, in Austria, an assignment for security purposes is not effective unless accompanied by an "overt act" of publicity, e.g., notification of the debtor or an entry in the assignor's books: *see* Kötz, *supra* note 37, at 98.

40. This qualification exists in German law as a result of court decisions. It is said to be based on the theory that where a business makes a bulk assignment of future receivables to a bank in circumstances where both parties ought to know that the assignor's inventory suppliers will refuse to supply without an assignment of the accounts arising on the sale of the inventory, the assignment constitutes a fraud on the suppliers and is invalid as unconscionable or against public policy pursuant to general codal values. The exception does not apply where these conditions do not exist, or where the bank loan was made specifically for inventory financing purposes, or where a suitably crafted clause in the bank assignment documentation proves successful. Note that the German courts have also ruled that the supplier/assignee may be subordinated in turn to either a prior or a subsequent assignee of the same receivables who purchases the receivables under a non-recourse bulk factoring agreement. *See* Kotz, *supra* note 37, at 98-99; *see also* Jens Hausman, *The Value of Public-Notice Filing Under Uniform Commercial Code Article 9: A Comparison with the German Legal System of Securities in Personal Property*, 25 GA. J. INT'L & COMP. L. 427 (1996).

41. This is the position in French law which requires notice or acceptance to be given in the form prescribed by the Civil Code. The French rule is considered to be representative on this point of the Romanistic systems. In the Scandinavian systems, and in English common law (based on the rule in *Dearle v. Hall* (1828) 38 E,R, 475, 492), the validity of the assignment against third parties likewise depends on the notification of the debtor and competing assignees are ranked according to the order of notification. *See* Kötz, *supra* note 37, at 94-96.

42. *See* Kötz, *supra* note 37, at 95; *see also* GOODE, *supra* note 3, at 705.

43. For instance, in England and France, the first assignee to give notice is subordinated if there is evidence the assignee knew at the time of the assignment

partial alternatives, as in the case of the *Loi Dailly* in France,[44] and the fragmented statutory registration regimes available in England.[45]

In still other systems, notice of an assignment must be registered in a public registry to take effect against third parties, and ranking among successive assignees depends on the order of registration.[46] The rationale for this approach is obvious: a public registry for giving notice of an assignment protects assignees by enabling them to preserve their priority status through timely registration, and it protects third parties by providing an objective accessible means for them to find out about prior assignments. Once again, however, matters are not so simple, and there is disagreement among systems adopting a first-to-register rule on the appropriate exceptions.[47]

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that the claim had already been assigned to a prior assignee who has not yet notified the debtor. The law of the Scandinavian countries does not recognize any equivalent exception. *See* Kötz, *supra* note 37, at 95.

44. *Loi Dailly* (named for its principal promoter)—Law no. 81-1 facilitating the granting of credit to enterprises (*Loi facilitant le credit aux enterprises*) of Jan. 2, 1981, JO 3 Jan p. 150. The *Loi Dailly* provides for the ongoing bulk transfer or accounts, both outright (*cession*) or as security (*nantissement*) by the delivery of a schedule or memorandum (*bordereau*) listing the accounts in prescribed form and signed by the assignor. The *Loi Dailly* was modified by the Law of Jan. 23, 1984 to provide explicitly for the assignability of future receivables even though the amount and the debtors are not yet determined. *See* Kötz, *supra* note 37, at 80, 94-95; *see also* Sidney Posel, *Factoring Accounts Receivable in France: Some Legal Aspects and American Comparisons*, 57 TUL. L. REV. 282 (1982).

45. In England, the first-to-give notice priority rule is effectively displaced when a prior assignment is registrable, and is in fact registered, on the theory that the second assignee is then presumed to have notice of the prior registered assignment. However, registration is not comprehensively available. A charge on the book debts of a company can be registered under the *Companies Act 1985*, but the Act does not extend to an outright sale of the book debts or to other kinds of receivables or intangibles. A general assignment of book debts by a sole proprietor or partnership can be registered as if it were a bill of sale but this is not possible for specific assignments (debts due from specified debtors or under specified contracts). *See* GOODE, *supra* note 3, at 705.

46. This is the general rule under the Personal Property Security Acts in effect in the Canadian common law provinces and three federal territories: *see, e.g.*, Ontario *PPSA*, sections 20(1) and 30(1). It is also the general rule under Article 9 of the Uniform Commercial Code in the United States which greatly influenced the Canadian PPSAs: *see* U.C.C. §9-322(a) (2000). The recently-enacted New Zealand Personal Property Securities Act 1999 is based on the Canadian PPSAs and adopts the same general rule in s. 66.

47. For instance, while the Canadian PPSAs and Article 9 of the Uniform Commercial Code share much commonality in their registration-based priority rules, revised Article 9 (2000) contains many more exceptions than its Canadian counterparts, including assignments of deposit accounts (where a concept of 'control' generally substitutes for registration-based priority under § 9-312, § 9-314, § 9-327) and the outright assignment (sale) of "payment intangibles" i.e. loan

The Working Group charged with preparing the draft Convention initially favoured a uniform substantive rule for priority. However, there was no consensus on what that rule should be. The Group explored the possibility of a registration-based priority rule supported by an international registry for filing notices of assignments. But states without an equivalent domestic priority theory were unwilling to take the radical step of endorsing that theory at the international level. Nor could such a regime have been confined to the international level since otherwise it would have been incapable of resolving priority between an assignment which met the criteria of internationality and a completely domestic assignment. Indeed, even states with a strong commitment to a general registration-based priority theory would not have been likely to endorse that solution at the international level without reserving the right to preserve their own diverse exceptions and qualifications under national law.

Faute de mieux, the Convention instead attempts international uniformity only at the choice of law level. It is true that the Annex to the Convention still provides for the possibility of a substantive priority regime based on registration. Section I of the Annex contemplates a simple time of registration priority rule, while Section II leaves open the possible future establishment of an international registry for the filing of data about assignments governed by the Convention. However, both sections operate purely on an opt-in basis by interested Contracting States.[48] Moreover, a State may instead decide to opt-in to the priority regime in Section III of the Annex (priority based on the time of the contract of the assignment) or Section IV (priority based on the time of notification of the assignment to the debtor). Even if the registration-based priority option is selected, States are free to declare non-uniform exceptions pursuant to article 42, and may develop and designate a domestic registry for filing notices of assignments as a substitute for the international registry.

In other words, the Annex essentially codifies the current diversity in substantive priority regimes among different legal systems.[49] Since it does nothing to achieve international substantive uniformity, it is unlikely that its provisions will be adopted by

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receivables other than credit card receivables (automatically effective without registration under § 9-309). *See generally* Ronald C.C. Cuming and Catherine Walsh, *Revised Article 9 of the Uniform Commercial Code: Implications for the Canadian Personal Property Security Acts*, 16 B.F.L.R. 339 (2001).

48. UNCITRAL Convention article 42.

49. *See supra* text beginning at note 37.

Contracting States. This leaves the choice of law rule in the Convention as the principal hope for enhancing legal certainty and predictability in international receivables financing.

B. Application of the Law of the Assignor's State to Priority

Under article 22 of the Convention, the priority of an assignee's right in the assigned receivable against competing claimants is referred to the law of the State in which the assignor is located.[50] The reasons why the assignor's location was thought to be the most appropriate connecting factor in the receivables financing context are best revealed by comparing it to the possible alternatives.

The proper law of the contract of assignment is clearly unacceptable. The only virtue of deferring priority to that law would be to empower the assignor to escape from an overly rigid domestic regime by including a choice of law clause in the assignment contract in favour of the law of a State with a more sympathetic receivables financing law. This motivation may be the realist subtext which explains the startling decision of the highest court in the Netherlands to interpret article 12(1) of the Rome Convention as intended to give the assignor and assignee unrestricted freedom to choose the governing law for the purposes of determining the effectiveness of the assignment against the assignor's insolvency administrator.[51] The effect of the court's decision was to apply German law so as to preserve the priority of an assignment in favour of a German assignee in Dutch insolvency proceedings despite the fact that the assignor was Dutch, and the assigned debt was governed by Dutch law and owed by a Dutch debtor.

As the Netherlands decision demonstrates, the effect of giving the assignor and assignee unqualified freedom to choose the law governing the priority of their assignment against third parties enables them to evade mandatory limitations on assignment of the most closely connected law. The regime governing assignments in the new Dutch Civil Code of 1992 has been subjected to widespread criticism as inimical to modern receivables financing practices, and it has naturally been speculated that the court saw contractual choice as an attractive means of escape.[52] But whether or not one

50. Article 30.1 replicates the same rule for the purposes of the mini-convention on conflict of laws contained in Chapter V of the Convention.

51. *See* Brandsma q.q. v. Hansa Chemie AG, HR, May 16, 1997, *supra* note 12.

52. *See* Struycken, *supra* note 3, at 353.

agrees with the wisdom of limitations on assignment articulated by any particular national law regime is beside the point. The fact is that unrestrained freedom of contract inevitably undermines the integrity of all national property law standards aimed at the protection of third parties and enacted in the interests of national public policy.[53] And this will be the result whether the particular regime is objectively considered to be inimical or sympathetic to an efficient and fair receivables financing regime.

There are those who defend unrestricted freedom of choice on the theory that it is best calculated to produce a free market in legal ideas, ultimately leading in practice to the choice of the "best" secured financing regime, thereby producing practical uniformity of result. This argument in effect amounts to a privatization of public policy; it is left to the parties to each individual assignment, not the law makers, to decide the optimal legal regime to govern the third party effects of assignment. But what is the best choice of law from the point of view of any particular assignee does not necessarily coincide with what is best from the point of view of the public order and of competing claimants. The likelihood of this discrepancy in perception means that a party autonomy rule may fail to yield a single governing law in a simple dispute involving competing assignments, each governed by a different proper law, and each valid and entitled to a first priority under that law (a plausible scenario, as where, e.g., the law chosen by the parties to govern the first assignment orders priority on the basis of first-in-time whereas the law chosen by the parties to a subsequent assignment orders priority on the basis of the order of registration of the assignments, and the second assignment in time is the first to be registered).

Considerations of this kind long ago persuaded law makers to settle on an objective connecting factor, the *lex situs* of the relevant asset, to determine the law applicable to the property effects of transactions involving tangible assets.[54] The fact that receivables and other intangible rights do not by definition have a physical situs does not justify discarding the general principle of objectivity which underpins the *lex situs* rule. It simply requires identification of an acceptable functional alternative to physical *situs*.

53. *Id.* at 354-56.

54. *See, e.g.*, WOLFF, *supra* note 3, at 511ff; Schilling, *Some European Decisions on Non-Possessory Security Rights in Private International Law*, 34 INT'L & COMP. L.Q. (1985).

Of the possible alternatives,[55] two enjoy significant support at the domestic law level. The first is the national *lex situs* of the debt, the law of the place where the debtor is located. The second is the law applicable to the assigned receivable—for contract-generated receivables of the kind governed by the Convention, this is effectively the proper law of the original contract between the assignor and the debtor.[56]

The attractiveness of one or the other depends to some extent on how the assigned obligation is conceptualized.[57] If it is viewed as a species of property right once "vested" in the assignee, then the situs of the debtor is attractive as the closest functional equivalent to the idea of practical control over the *res* (here the person of the debtor) that underlies the *lex situs* rule for tangible property rights. Conversely, if the assignment is conceptualized as merely a substitution of the creditor to whom the assigned obligation is owed, then it is reasonable to see the priority of the assignee's right as governed by the same law that governs the assigned obligation.

Conceptual considerations aside (although their influence should never be underestimated), the law governing the assigned receivable is the more attractive choice of the two. Admittedly, the applicable law is subject to manipulation by the insertion of a standard form choice of law clause in all contracts entered into between a prospective assignor and its various debtors. Nonetheless, the law governing the assigned obligation offers a more stable connecting factor than the debtor's location which is vulnerable to change after an initial assignment. This makes it a better choice to deal with issues of priority between competing assignments. It also has the advantage of simplifying the choice of law matrix since the same law also governs the assignee's rights against the debtor (more on this later [58]).

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55. Before the principle of party autonomy (free choice) became the near-universal rule for choice of law in contract, the law of the place where the contract of assignment was executed was seen as a possible connecting factor. It suffers from the same defect as the proper law of the contract of assignment in being incapable of designating a single governing law in a competition between successive assignments, each executed in a different state. Moreover, to quote Wolff's withering dismissal of such a rule, to "test the assignment by the place where it was made is to choose the least important of all points of contact, to substitute fortuity for reason." WOLFF, *supra* note 3, at 542.

56. This is the approach endorsed in German law: *see supra* note 13.

57. *See* WOLFF, *supra* note 3, at 537-539.

58. See the text under the sub-heading "Choice of Law for Assignee-Debtor Relations" *infra*.

However, in modern financing practice, the assignment of multiple and future receivables in a single transaction is commonplace, whether the assignment involves the outright sale of receivables as in a factoring or securitization arrangement, or their assignment merely as collateral for a secured obligation. This practical reality makes application of the law governing the assigned debt a commercially inefficient solution. The assignee would need to scrutinize each of the assigned contracts to determine the applicable law and would then have to conform to the priority rules of all relevant states. Priority would vary for different receivables depending on their governing law, increasing the costs of dispute resolution and insolvency administration. If the assignment included future receivables owing by as-yet-unidentified debtors, the assignee might not even be able to predict which laws might potentially apply.

It is the practical demands of modern receivables financing which ultimately led the Commission to endorse the law of the assignor's location as the most appropriate choice of law rule for priority. It is the only approach capable of supplying a single predictable governing law for the global assignment of multiple receivables owing by debtors in different states and for the assignment of future receivables, thereby vastly reducing the inquiry and monitoring burden on the assignee.

The superiority of the assignor location rule has been recognized by analysts who have examined the issue with the practical realities of modern global assignment practices in mind.[59] Some, however, have suggested a dualist approach. The law of the assignor's location would apply to bulk assignments of existing and future debts but the *lex situs* of the debt (effectively the *lex situs* of the debtor) would apply to assignments of specific debts.[60] This kind of qualification did not find its way into the Convention. A dualist approach would have introduced an undesirable level of

59. *See* Moshinsky, *supra* note 3, at 611-13, 624; Struycken, *supra* note 3, at 357-60; Note, *supra* note 3. Struycken, *supra* note 3, at 357 n.50 cites Kieringer as also favouring the same rule. *See also Group of Experts Report Prepared by the Permanent Bureau of the Hague Conference on Private International Law*, UNCITRAL A/CN.9/WG.II/WP90 (July 10, 1998) para 4.4.

60. *See* GOODE, *supra* note 3, at 1148. But Goode is somewhat ambiguous on the whole question. In footnote 182 at 1128, he acknowledges that "in order to have a uniform regime for debts generally, even the assignment of specific debts could be subjected to the law of the assignor's place of business as regards their proprietary effects." But then, at 1149-50, he appears to revert to an unqualified rule in favour of the *lex situs* of the debtor for priorities, with no mention of any exception for global assignments of receivables.

complexity and uncertainty into the choice of law exercise: a different law would potentially be applicable depending on whether the assignment was structured as a global one or as a series of specific assignments. This would have created the potential for manipulation of the governing law. Moreover, such an approach would fail to yield a single governing law in a contest between an assignee of a specific receivable and an assignee taking under a global assignment of all of the same assignor's receivables, including the specific receivable which was the subject of the prior assignment.

C. *Defining the Location of the Assignor*

Under the Convention, the assignor is presumed to be located at its place of business or at his or her habitual residence in the rare case of an assignor without a place of business.[61] But what if the assignor is an enterprise with multiple places of business or branches in different states? In such a case, it is necessary to designate one place of business as controlling. Otherwise, the assignee's priority status would be governed by multiple and potentially conflicting priority regimes, destroying the certainty and predictability sought to be obtained by using a single stable connecting factor for choice of law in the first instance.

Two choices are possible: the *de facto* centre of the assignor's business, i.e. its chief executive office or centre of administration, or its legal centre, i.e .the place under whose law it is constituted and where its registered "head office" is located.

From the point of view of the assignee, a registered head office or equivalent test provides greater certainty and predictability than one predicated on a firm's administrative centre. The former is easily ascertained by checking the public records of the state under whose laws the entity was constituted. Locating the latter is a subjective and fact-dependent exercise, which may give rise to interpretative difficulties on particular facts.[62] Moreover, a

61. UNCITRAL Convention article 5(h).

62. *See* Kevin White, *O' Give Me a Home: Determining the Location of the Debtor's Chief Executive Office Under Section 9-103 of the UCC*, 18 REV. LITIG. 207 (1999) (reviewing conflicting tests developed by different United States courts to determine chief executive office for the purposes of the conflicts rules for perfection in old U.C.C. Art 9: (1) centre of greatest volume of business; (2) centre of main business management taking into account the reasonable expectations of creditors; (3) executive headquarters.) The latter is the most appropriate test and the one evidently intended by the use of the more explicit wording, "place where [the assignor's] central administration is exercised " in article 6(i) of the

company's administrative centre is more easily relocated and more prone to relocation than its registered head office or place of incorporation.

The Convention nonetheless adopts a *de facto* centre of business test: an assignor with places of business in more than one state is deemed to be located in the state where its central administration is exercised.[63] Once again, this policy choice is in line with the views of analysts who have seriously considered the issue.[64] Priority is concerned with the impact of the assignment on third parties, and from their perspective, a *de facto* centre of business test is more appropriate. The law of that jurisdiction is more likely to be in the reasonable contemplation of assignees and creditors who enter into business dealings with the assignor. Application of the assignor's law also eliminates any incentive for assignors to incorporate in an insolvency haven to the potential prejudice of less sophisticated creditors. The assignor's real centre of administration is also the place where the principal insolvency proceedings involving the assignor are most likely to be commenced. This means that the law of the insolvency forum will typically coincide with the substantive law applicable to priorities, decreasing the costs of having to plead and prove a foreign law, and eliminating the potential for conflict with the public policy of the insolvency forum.

Finally, the assignor's location in a Contracting State is the principal territorial triggering factor for application of the Convention.[65] To avoid confusion and enhance predictability, it is desirable that the test for location be the same in both contexts, and a centre of administration test is more satisfactory for territorial

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UNCITRAL Convention.

63. UNCITRAL Convention article 5(h).

64. *See* Note, *supra* note 3; Moshinsky, *supra* note 3, at 611-613; Struycken, *supra* note 3, at 358-60. Note that the general rules for locating an assignor under revised Article 9 of the Uniform Commercial Code in the United States are substantially similar to those found in article 5(h) of the Convention. Under revised § 9-307(b), a debtor who is a natural person is deemed to be located at his or her principal residence, while a legal person is deemed to be located at its place of business, or at its chief executive office if it has a place of business in more than one state. The Article 9 concept of chief executive office is essentially the same as the central administration concept used in the Convention. See § 9-307 Official Comment 2: "'Chief executive office' means the place from which the debtor manages the main part of its business operations or other affairs." The Canadian Personal Property Security Acts also adopt a chief executive test location rule for debtors located in multiple jurisdictions: see e.g. Ontario PPSA section 7.

65. Article 1(1)(a).. And see *supra* text under the sub-heading "Scope of Application of the Conflicts Rules of the Convention."

scope purposes. Relative to a legal centre of business test, it ensures a wider scope of application for the Convention since jurisdictions which offer corporate charters for taxation or other reasons of convenience are often not the states which are the first to adopt international conventions.

D. Location of the Assignor in Federal States

In states organized on federal lines, law making jurisdiction over assignment law may be, and typically is, vested in the individual territorial units which comprise that state rather than at the federal or national level. In such instances, it is not enough to locate the assignor in the state as whole; it is necessary to link the assignor in a territorial unit. The Convention accommodates this need by a special interpretation rule, which essentially repeats the general rules for location within a State proper. Thus, an assignor is deemed to be located in the territorial unit within a State in which it has its place of business, in the territorial unit where it has its central administration is exercised if it has a place of business in more than one territorial unit, and in the territorial unit of habitual residence if the assignor has no place of business.[66] However, states are permitted to specify different intrastate location rules by declaration under the Convention.[67] This qualification is intended to accommodate the needs of states, the notable example being the United States under revised Article 9 of the Uniform Commercial Code, which, for reasons of administrative efficiency, use different location criteria in the intra-state as opposed to international conflicts context.[68]

66. UNCITRAL Convention article 36.

67. *Id.*

68. Under revised U.C.C. article 9, the general rules for location in article § 9-307(b) are subject to an exception in the case of a "registered organization," i.e. an entity organized under a United States federal or state law which requires a public record to be maintained disclosing the organization, e.g. U.S. companies and U.S. limited partnerships. Such U.S.-registered organizations are deemed to be located in their state of organization within the United States in the case of entities organized under U.S. state law, or in the state within the United States designated by federal law or by the parties in the case of entities organized under U.S. federal law. *See* U.C.C. §§ 9-102(70)(76), 9-307 (e), (f). The ability to make a declaration under article 36 of the Convention will enable the U.S. to preserve these special internal location criteria in cases where the assignor is found to be located somewhere within the United States under the location rules in article 5(h) of the Convention.

E. Location of Banks and Other Financial Institutions

During the preparation of the Convention, there was a certain level of ongoing support for creating special location criteria in the case of assignments made by a bank carrying on business in different countries through a branch or agency structure, as opposed to a separate corporate subsidiary. The aim of such exceptions would have been to refer priority issues to the law of the State where the branch or agency that had the closest connection to the assigned receivable is located, as opposed to the law of the State where the central administration of the bank is exercised.[69] In the end, no such exception appears in the Convention, and, on balance, that was the appropriate result. Such an exception would have generated far more difficulties than it would have resolved.[70]

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69. This is the approach apparently taken by revised U.C.C. article 9, which adopts special location rules for a foreign bank that carries out operations in the United States through a branch or agency structure, as opposed to an independent corporate subsidiary. The branch or agency of the foreign bank is deemed to be located in the state within the United States where it is licensed if all branches or agencies are licensed only in that one state. *See* U.C.C. § 9-307(i). If the foreign bank has branches or agencies in more that one state within the United States, then the branch or agency is deemed to be located in the state within the United States designated by federal law, or designated by the branch or agency itself if federal law authorizes such designation; otherwise, it is deemed to be located in the District of Columbia. *See* U.C.C. § 9-307(f). These special location rules apply for the purposes of the general choice of law rule in § 9-301 under which the law of the assignor's location governs issues relating to perfection and priority. They effectively seek to treat the branch or agency as though it were an independent assignor, a separate entity, so as to bring into play the application of U.S. law. To be workable, the application of these special location rules must therefore be conditioned implicitly on the assignment having been executed in the name or on behalf of the U.S. branch or agency acting as though it were a separate entity. This may raise difficult questions of proof of intent. And what if such an assignment comes into competition with an assignment of the same receivable made by the bank as whole, or through another department or agency located in a different country? This is not an implausible scenario as where, e.g., the branch assigns specific receivables arising through branch operations and the bank executes a global assignment of all its receivables. Does U.S, law still govern simply because one of the competing assignments happened to be made by or through a U.S. branch or agency? If so, what happens if the litigation is heard in a different jurisdiction, e.g. the jurisdiction where the competing assignee is located? The foreign court is unlikely to defer to U.S. law simply because one of the assignments happened to be made through a U.S. branch. Similarly, what happens if insolvency proceedings involving the foreign bank are instituted in its home jurisdiction? Without a developed international consensus on the treatment of branches as separate legal entities, it is unlikely that a foreign insolvency tribunal will be willing to defer to United States assignment law in view of the potential detriment to creditors and competing assignees in other countries.

70. For a detailed critique of the problems of a branch office location rule for determining the law applicable to an assignment of accounts, from which some of

First, there is the very serious challenge of defining the concept of a "bank" and a "branch." The problems are especially acute in today's dynamic financial climate in which such traditional banking activities as accepting deposits and making loans or extending credit are being undertaken by entities far removed from the traditional idea of a bank, and with technological advances rapidly changing the traditional physical idea of the "branch" as well as the accounting structure of branch operations.

Second, treating the in-country branch of a foreign financial service provider as effectively a separate legal entity threatens the certainty and stability of general legal doctrine concerning legal personality. Admittedly, the local branch of a foreign bank is generally subject to separate regulation and supervision under the banking laws of most states to much the same extent as if it were operating as a corporate subsidiary However, for the purposes of private law, including debtor/creditor, property, obligations, mandate or agency and insolvency law, branches are not typically treated as having a distinct or independent legal personality.

Third, there are the public policy implications inherent in excepting banks from the general rules applicable to other businesses. It is true that banks are more apt to operate internationally through a branch rather than subsidiary structure, in part so as to be able to more easily satisfy minimum capital or asset requirements imposed by regulators. However, this is not a static state of affairs and other entities may find benefits in a branch or agency structure.

Fourth, a branch office exception would generate uncertainties and complexities in the event of the assignor's insolvency. The effectiveness of assignments would have to be tested by reference to the laws of the state in which each individual branch is located. This would greatly increase the adjudicatory burden on the insolvency court. Moreover, there is no necessary correlation in the insolvency context between the location of the various branches and the claims of the assignor's creditors. Since insolvency laws typically extend national treatment to foreign and local creditors alike, the benefits of subordination of the assignee's interest under the laws of a state where a particular branch is located would not necessarily inure to the benefit of those creditors most closely connected to that branch. Although a rule to such effect might be

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the points made in the text of the paper are taken. *See* Note, *supra* note 3, at 433-37; *see also supra* note 69.

fashioned, there is no easy or obvious way to carry out the accounting.

Fifth, a branch office exception would also increase the burden on prospective assignees. An assignee of receivables owing to branches located in a multiplicity of states would have to conform to the priority rules of all of them, including conformity with any filing requirements imposed by those laws.

Finally, what about creditors whose principal dealings with the assignor are at the assignor's head office or through a different branch than the one to which the receivables relate? On what theory should their priority rights against the assignee be determined by reference to the law of the jurisdiction where the branch office to which the receivable relates is located? And why should creditors be required to investigate the records, if any, of all states in which branch offices are located in order to gain an overall picture of the assignor's financial health?

F. Public Policy and Mandatory Law Limits on the Application of the Law of the Assignor's Location

Will States hesitate to endorse the Convention out of concern that deference to the law of the assignor's location to determine the priority of the assignee's interest may interfere with their own fundamental third party protection and insolvency policies? Under the centre of administration location rule, the litigation forum will very often coincide with the state where the assignor is located. This means that the forum's own domestic law will be the law applicable to priority under the Convention choice of law rule in any event. So a conflict between domestic priority policy, and the priority policy of the law designated as applicable under the Convention can arise only if the litigation takes place in a State other than the State where the assignor is located, e.g. the state where the debtor or assignee is located.

The whole point of the Convention choice of law rule is, of course, to ensure certainty and predictability in the determination of the law applicable to the priority of an assignee's interest against competing claimants. If extensive exceptions were permitted, that objective would be lost. So the Convention recognizes only two highly qualified limitations.

First, a court may refuse to apply a provision of the law of the State in which the assignor is located only if that provision is

manifestly contrary to the public policy of the forum State.[71] This is a commonplace qualification in international law conventions, and its sphere of operation is now everywhere understood to be very attenuated.[72] The law otherwise applicable will be excluded only if its application would offend some widely-shared moral or ethical standard, not merely the singular policy of the particular forum.

Public policy in this sense operates primarily as an exclusionary rule: it permits rejection of the relevant provision of foreign law without thereby necessarily substituting the positive application of an equivalent provision of domestic law. The latter is the function of so-called "super-mandatory rules:" rules which may not be excluded by contract and which reflect a sufficiently strong social or economic policy concern of national law to justify their application so as to override the otherwise applicable law even in cases with an international complexion, provided that the policy objectives of the rule are engaged in the facts before the court.[73]

The Convention does *not* generally preserve the super-mandatory rules of the forum or of any other interested state. On the contrary, it expressly prohibits the displacement of the law of the assignor's state by reference to the mandatory rules of either the forum or any third state.[74] This unprecedented approach was considered necessary to avoid the risk of completely undermining the Convention's general choice of law rule. Unlike the public policy exclusion, mandatory rules may reflect no more than the singular, albeit strongly-held, policy objectives of the particular jurisdiction in which they are found. As such, they could, in theory, include rules requiring registration or notification of the debtor as a pre-condition to priority, predicated as such rules are on public policy considerations having to do with the protection of local third parties.

To avoid forum priority policy overriding the priority policy of the assignor's location, the Convention contains only a very limited saving clause for a very limited category of forum priority rules"[75]: preferential rights to priority that arise by operation of law[76] of the

71. UNCITRAL Convention article 23.1.

72. *See generally* Nathalie Voser, *Mandatory Rules of Law as a Limitation on the Law Applicable in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 319 (1996).

73. *See, e.g.*, GOODE, *supra* note 3, at 1111-13; *see also* Voser, *supra* note 72.

74. UNCITRAL Convention article 23.2.

75. UNCITRAL Convention article 23.3.

76. Although only non-consensual preferential rights are preserved, note that the claim of a creditor which is "secured" by a preferential right may itself have arisen out of a consensual relationship, e.g. statutory preferential rights in favour

forum state, and which would have priority over the rights of an assignee in insolvency proceedings under the law of the forum state. This exception is stated in permissive terms ("may") to signal that the courts should take a restrained approach, preserving local preferential rights to priority only if their underlying policy rationale is clearly engaged.

Despite its highly qualified scope, this exception still creates some uncertainty for prospective assignees. They must still investigate other potentially connected laws, particularly the law of the debtor's location, to determine to what extent their priority under the law of the assignor's location may be undermined by super-priority rights afforded by operation of law under that other law in favour of competing claimants, e.g., the state or employees of the assignor.

A provision which appeared in earlier versions of the Convention, (and which was retained in the *UNIDROIT Convention on International Interests in Mobile Equipment*) would have offered a more satisfactory compromise between preserving the rights of preferential creditors under domestic law and the certainty needs of financiers. Under that provision, contracting states would have been required to specifically identify by declaration the categories of preferential rights arising under domestic law that are to have priority over the assignee's interest in proceedings occurring in that state. However, a number of States objected, apparently on the basis that it would be "too difficult" to identify the complex of such interests within their domestic systems, a basis of objection scarcely calculated to alleviate the concerns of financers. So while the Convention permits such a declaration to be deposited on a purely voluntary basis,[77] preferential rights are still preserved in the absence of a declaration. It is to be hoped that most States take advantage of the opportunity (and that interested commercial organizations encourage them to do so).

G. Effect of Absence of a Public Registration Regime Under the Applicable Law

For states that require public filing as a pre-condition to the third party effectiveness of an assignment, the prospect of having to refer priority to a governing law which does not have an equivalent public disclosure rule may well create concern. Consider, for

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of employees.

77. UNCITRAL Convention article 23.3 (final sentence).

example, a Ruritanian company which operates branch establishments throughout Canada and the United States where public registration is generally required to perfect the assignee's interest against competing claimants and operates as the usual means of ordering priority. Assume Ruritanian law instead orders priority on the basis of a simple *nemo dat quod non habet* principle, under which an assignment once executed takes effect against subsequent third parties. If Ruritanian law applies at the choice of law level, a prospective assignee or creditor who deals with the company through any of its North American branches will have no objectively reliable means of ascertaining whether the receivables already have been assigned.

The conflicts regimes in some of the Canadian Personal Property Security Acts and in Article 9 of the Uniform Commercial Code in the United States seek to protect local creditors and assignees in this situation by way of an explicit exception to the general application of the law of the assignor's location to issues of perfection and priority. Under the relevant provision in the Canadian Acts, an assignee's interest is subordinate to an interest acquired in any receivable payable within the province if the assignor's law does not provide for public filing or similar public notification of an assignment. To avoid subordination, the assignee must file locally before the competing interest arises.[78]

A similar policy informs revised Article 9 of the Uniform Commercial Code in the United States. A foreign business assignor whose home law does not require public registration is deemed to be located in the District of Columbia so as to require filing of a notice of the assignment in the DC registry as a condition of asserting rights in the assigned receivables against competing claimants.[79]

In contrast, the priority regimes in Canada's largest and most populous provinces, Ontario and Quebec, refer priority in accounts to the law of the assignor's location without regard to the presence or absence of a public filing system under that law.[80] The legal and business communities in these provinces apparently have not lobbied for the introduction of the exceptions found in the other provincial laws and in Article 9. This may reflect the perception

78. *See, e.g.*, New Brunswick PPSA sections 7(3)-(4).

79. U.C.C. § 9-307(c). The revised rule replaces old UCC § 9-103(3) under which the law of the state in which the foreign assignor had its "major executive office" within the United States governed perfection where the assignor was located in a jurisdiction which did not provide for perfection by public filing.

80. *See* Civil Code of Quebec article 3108 and Ontario PPSA section 7(2).

that such exceptions serve only to increase transaction costs without bringing about any complementary increase in certainty and predictability. Transaction costs are increased because prospective assignees must investigate the law in place in the assignor's location and reach qualitative judgments on the existence and adequacy of any filing regime provided by that law in order to know whether they should also file under Article 9 or the PPSA, as the case may be. Moreover, any such filing does not relieve a prospective assignee from the need to also comply with the priority requirements of the law of the assignor's location. This is because, as a practical matter, priority disputes are most likely to be litigated in the state where the assignor is located, and the courts in that state will apply their own priority rules, not those of Article 9 or the PPSAs, to resolve that dispute. In other words, such exceptions may actually operate to decrease certainty and predictability by bringing into play two different and conflicting priority regimes, depending on the forum in which any future priority dispute is eventually litigated.

At the level of principle, exceptions of this kind constitute an attempt to superimpose domestic priority standards on assignments emanating from a foreign assignor and otherwise considered to be most appropriately governed by the law of the assignor's location. As noted above, the Convention generally prohibits the displacement of the priority rules of the assignor's state by reference to the super-mandatory priority rules of forum law.[81] It follows that States wishing to adopt the Convention must be prepared to abandon attempts to export their own national priority policy to the international private law sphere.

In fact, no proposal was ever made in the course of preparation of the Convention to incorporate any exception to the general choice of law rule where the assignor's location lacked a public filing regime. Politically, this was wise. If international consensus could not be achieved on a registration-based priority rule at the substantive level, why would states lacking such a system have been prepared to agree to a registration-biassed exception at the choice of law level? Politics aside, such an exception would have detracted, for the reasons given above, from the general mission of the Convention to ensure application of a single predictable governing law for priority.

81. *See supra* note 74.

H. Choice of Law for Priority in the Proceeds of the Assigned Receivable

The Convention confirms, as a matter of uniform substantive law, that an assignee's right in the assigned receivable carries with it a legal right to the proceeds of its collection, regardless of whether the proceeds are paid directly to the assignee, to the assignor, or to a third party over whom the assignee has priority.[82] However, the substantive right to proceeds recognized by the Convention operates only "as between the assignor and assignee."[83] The priority of the assignee's right to retain or claim proceeds against competing claimants is dealt with only in a very limited fashion, and then only at the choice of law level.

The law of the assignor's location determines the priority of the assignee's entitlement to any proceeds of the assigned receivable in two instances. The first is where the proceeds are already in the assignee's hands when the priority dispute arises.[84] The second is where the proceeds are received by the assignor under instructions from the assignee to hold the proceeds for the benefit of the assignee separately, and are in fact sufficiently segregated from the assignor's other assets so as to be reasonably identifiable.[85] However, this second exception is qualified. The law of the assignor's location does not necessarily apply to the priority of any person who has a right of set-off against the proceeds or whose right in the proceeds is created by agreement and is not derived from a right in the receivable.[86] This latter reference clearly covers, and is meant minimally to cover, a claim to cash proceeds which have been deposited into a deposit account held by the assignor with, and asserted by, a bank or securities intermediary pursuant to an agreement entered into with the assignor. But the caveat is cast in general terms and is potentially much broader. It covers any competition between a receivables assignee and a claimant who

82. UNCITRAL Convention article 14.

83. This is made clear in the *chapeau* to article 14. Note that the assignee's right to proceeds as against the assignor is subject to any contrary agreement between the parties, and, under article 14.3, is limited to the value of the assignee's right in the assigned receivable. This latter caveat covers cases where the receivables are assigned by way of security only, with the result that the assignee's may retain collected proceeds only to the extent necessary to discharge the secured obligation.

84. UNCITRAL Convention article 24.1.

85. UNCITRAL Convention article 24.2.

86. UNCITRAL Convention article 24.3.

asserts a right to the proceeds as a result of an agreement which directly covers the relevant proceeds as opposed to claiming them as a result of an assignment of the receivable which generated the proceeds.

These two exceptions aside, the priority of an assignee's claim to proceeds will be governed by the law applicable by virtue of the rules of private international law of the particular forum. In other words, the Convention choice of law rule for priority in the assigned receivable does not apply to priority in the proceeds of collection of the receivable. This is a necessary gap. Proceeds may take any form and it would have been inappropriate and practically impossible to establish a uniform choice of law regime for all conceivable categories of tangible and intangible movables in a convention devoted to the specific topic of receivables.

IV. Choice of Law for the Contractual Aspects of Assignor and Assignee Relations

A. Introduction

At the substantive level, all legal systems accept that the reciprocal rights and obligations of the assignor and assignee are governed by their contract.[87] This philosophy is replicated in the substantive rules of the Convention on the terms, condition, representations and warranties of the assignor and assignee relationship. These are uniformly stated as suppletive or default rules, applicable only in the absence of contrary agreement.[88]

Not surprisingly, the same philosophy is carried over to the choice of law regime in article 28 of Chapter V of the Convention. In line with the prevailing approach for choice of law in contract generally,[89] the assignor and assignee are left free to choose the law

87. *See* Kötz, *supra* note 37, at 82.

88. *See* Chapter IV, Section I (articles 11-14).

89. *See, e.g.*, article 3(1) of the Rome Convention. A few legal systems still require that the transaction bear at least a minimal reasonable connection to the chosen law. Most notably, the rule of party autonomy in the United States is subject to the proviso that the law chosen by the parties bear some reasonable relation to the transaction. *See, e.g.*, UCC § 1-105(1) (1994) which permits the parties to stipulate the law which will govern their transaction *if* the stipulated law "bears a reasonable relation" to the transaction. The official comment explains that ordinarily the parties must choose a jurisdiction "where a significant enough portion of the making or performance of the contract" will occur. However, the proviso is construed liberally and the American Law Institute is currently considering adoption of a broader rule of party autonomy for choice of law matters governed by UCC § 1-105(1). *See* Ryan E. Bull, *Operation of the New Article 9*

governing the mutual rights and obligations arising from the agreement between them.[90] In the absence of a choice, the applicable law is that of the State with which the contract of assignment is most closely connected.[91] This again reflects widely-shared views on the appropriate default formula.[92].

The parties' freedom of choice is subject to one caveat. The Convention preserves the discretionary application of the super-mandatory rules of the forum state and of a closely-connected third country.[93] The preservation of super mandatory rules is unlikely to have much practical impact. In the vast majority of legal systems, the parties to a contract of assignment are left free to stipulate their mutual rights and duties.[94] Moreover, it is widely agreed that in international contracts, the exercise of judicial discretion to over-ride the parties' choice of law should be confined to those rules which are of such fundamental importance to the social or

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Choice of Law Regime in an International Context, 78 TEX. L. REV. 679, 692 (2000) (references cited in n.46).

90. *See* Article 28.1. Note that Article 28.1 refers simply to the "law chosen by the parties." There is no explicit requirement for an express choice. In determining whether a choice of law can be implied, the forum court presumably can apply its own supplementary private international law principles. Under, e.g., article 3(1) of the Rome Convention, the parties' choice may be implied if their intention is demonstrated with reasonable certainty from the terms of the contract or the circumstances of the case. It only if an examination of the parties' intention does no reveal an implied choice that one then applies the closest connection formula in article 4(1). It is a matter of debate whether there is any practical difference in result between an implied choice and closest connection formula. *See, e.g.*, PETER GABRIEL, LEGAL ASPECTS OF SYNDICATED LOANS 21-27 (London: Butterworths, 1986). Courts frequently have used the tests of implied intention and closest connection interchangeably, and in a manner which takes account of the parties's interests. Thus, the fact that the contract uses language and terms which are appropriate for one system but not another, or contains a choice of forum or currency of payment obligation in favour of one country as opposed to another, has been regarded in some cases as a weighty indicator of both implied intention and closest connection. *See, e.g.*, Imperial Life Assurance Co. of Canada v. Colmenares [1967] SCR 443; Amin Rasheed Shipping Corp. v. Kuwait Insurance Co. [1984] AC 50 (HL).

91. *See* article 28.2.

92. *See, e.g.*, article 4(1) of the Rome Convention. The Rome Convention, in article 4(2), presumes that a contract is most closely connected with the country where the party who is to effect the performance is located. The test of characteristic performance means the performance that is most characteristic of the particular type of contract, e.g. for a contract of sale, the delivery of goods, for a contract of services, the performance of those services. Applied to the assignment context, application of the characteristic performance test in the Rome Convention would yield, at least in simple cases, a presumption in favour of the law of the assignor's location as the most closely connected law. *See also* Sturycken, *supra* note 3, at 359.

93. UNCITRAL Convention article 31.

94. *See* Kötz, *supra* note 37, at 82.

economic goals of the relevant state as to require their application even in cases where the contract also implicates the interests of other states by virtue of its international connectivity.[95] Even then, the forum rule should be invoked only if the issue falls within the spatial scope of the rule, as determined from the territorial linkages expressly spelled out in the rule, or, in the more typical case where the legislation is silent, from an analysis of its underlying policy.

A similar cautionary approach must be taken to the operation of the public policy exception recognized by the Convention.[96] In contrast to super-mandatory rules, which are rules of positive application overriding the proper law of the contract, the public policy exception is concerned with the circumstances when the court can invoke forum public policy as a negative rule of rejection to exclude the application of a foreign law which would otherwise be applicable. Under the Convention, the court can do this only if the foreign provision is "manifestly contrary" to forum public policy. This terminology is widely used in international conventions and is designed to signal to the courts that they should exercise extreme caution before invoking subjective domestic concepts of public policy to deny effect to contractual provisions contained in an international contract which are valid and enforceable under the law governing that contract.

V. Choice of Law for the Proprietary Aspects of Assignments

Under article 29, the sphere of the proper law of the contract of assignment is clearly confined to the purely contractual or personal aspects of the assignor/assignee relationship, e.g. the interpretation of its terms and conditions including implications as to party intent, the assignee's obligation to pay the price or to render the promised credit as the case may be, the existence and effect of any representations and warranties as to the validity and enforceability of the assigned debt, and as to the assignee's recourse against the assignor in the event of breach. But what law governs the assignment itself, i.e., the actual transfer of title, or the creation of security rights, in the assigned receivables as opposed to the contractual arrangements surrounding that transfer?

Considerations of comparative law support referring issues relating to the proprietary aspects of assignments to the law governing priority.[97] This is because, while some legal systems draw

95. *See, e.g.*, GOODE, *supra* note 3, at 1111-13; *see also* Voser, *supra* note 72.
96. UNCITRAL Convention article 32.
97. *See* the persuasive analysis by Struycken, *supra* note 3, at 357-360.

a clear distinction between the *inter partes* and third party effectiveness of assignments, and their relative priority ranking, in others, the only question is whether the assignor has done whatever is required to vest title to the assigned receivable in the particular assignee. If so, the assignment takes effect simultaneously against the debtor and third parties, including subsequent assignees and the assignor's insolvency administrator. This diversity of conceptual approaches makes it difficult, in devising a workable choice of law formula, to sever the law to govern issues relating to the proprietary effectiveness of the assignment from the law to govern issues relating to its third party effects.

The Convention seeks to straddle the murky property/priority dividing line through an expansive definition of the scope of the "priority" issues governed by the law of the assignor's location. Read in isolation, the definition is broad enough to capture the property transfer rules of the applicable law on the theory that the satisfaction of any requirements necessary to render an assignment effective as between the parties are necessarily also preconditions to the effectiveness of the assignment against third parties.[98] In other words, where issues of proprietary effectiveness arise in the context of a priority dispute with a competing claimant, the Convention can be read as endorsing the view that property and priority issues should be subject to the same governing law; the law of the assignor's location.

However, for assignments within the territorial scope of the Convention, the choice of law rule for priority in article 22 (and the associated definition of priority in article 5(g)) has to be read in conjunction with the substantive rule in article 8 dealing with the effectiveness of assignments.[99] Article 8 stipulates that an assignment is not ineffective and may not be denied priority even against third parties solely on the ground that it involves multiple receivables or future receivables.

This attempt to combine a substantive rule for the effectiveness of assignments and a choice of law rule for priority

98. Article 5(g) defines "priority" for the purposes of the choice of law rule in article 22 (and the parallel rule in article 30 of Chapter V) as follows: "'Priority' means the right of a person in preference to the right of another person and, to the extent relevant for such purpose, includes the determination whether the right is a personal right or a property right, whether or not it is a security right for indebtedness or other obligation and whether any requirements necessary to render the right effective against a competing claimant have been satisfied."

99. The opening words of article 22 indicate that the law of the assignor's location governs priority "with the exception of matters that are settled elsewhere in the Convention. . ."

may give rise to difficult interpretive questions depending on the content of the legal regime in place in the particular assignor's location. Consider, for instance, the provisions of the 1992 Dutch Civil Code under which an assignment by way of security takes effect only upon notification of the debtor or upon execution (and registration in a private registry to prevent fraudulent antedating) of a notarial deed specifically listing the assigned receivables one by one.[100] By virtue of these requirements, it is clear that an assignment of the kind sought to be validated by article 8 of the Convention—an assignment of all present and future debts owing to the assignor—would be treated as invalid and ineffective as a matter of Dutch law. But what if the Netherlands were to adopt the Convention? Article 8 stipulates that an assignment cannot be declared ineffective even against third parties merely because it involves unspecified future or multiple receivables. It is arguable that article 8 would therefore operate to render such an assignment effective, even against competing claimants, and even though, assuming the assignor were Dutch, the law of the Netherlands would be the law otherwise applicable to priority under article 22 of the Convention. While this result might seem welcome in view of the criticism that has been levelled against the restrictive Dutch regime, it does little to advance certainty and predictability. After all, if Dutch law does not contemplate such an assignment ever being effective in the first instance, how can the parties predict how its priority status will be resolved?[101]

The preceding analysis suggests that if confusion is to be avoided, states that elect to implement the Convention may need to adjust their domestic rules on the effectiveness of assignments of bulk and future receivables in a manner compatible with the liberal Convention rules. It would still be open to these states to limit the third party effects of such assignments if this is considered desirable for public policy reasons, e.g., in order to preserve a cushion of assets in the form of future receivables to feed the claims of the assignor's execution creditors or insolvency trustee. However, to enable the smooth coordinated application of articles 8 and 22, this

100. *See* Struycken, *supra* note 3, at 352.

101. As noted earlier, in *Brandsma q.q. v. Hansa Chemie AG*, May 16 1997, *supra* note 12, the Hoge Radd validated such an assignment of future receivables, relying on an implied choice of German law in the Dutch assignor's contract of assignment. However, the contest there was between the assignee and the assignor's Dutch liquidator meaning that simple property theories were adequate to resolve the priority issue. But if the dispute involved competing assignments, the courts would have to manufacture a more sophisticated theory of priorities.

will likely need to be done via an explicit priority or third party opposability rule fashioned in a manner that does not bring about an *a priori* invalidation of an assignment of future receivables. In other words, States unfamiliar with the concept may nonetheless need to introduce the idea of the relativity of title into their assignment laws in order to accommodate future receivables financing as contemplated by article 8 while still preserving their own national substantive priority policies as contemplated by article 22.

In the context of current Dutch law, a rule which authorized the effective assignment of future receivables, but then ordered priority against competing claimants on the basis of the time of notification of the debtor or execution of a deed identifying the particular receivable, would probably work. Although such a regime would continue to impair full-fledged future receivables financing, it would not run directly afoul of article 8 since it would not operate to invalidate such assignments in the first instance. In other words, while article 8 will likely have the effect of bringing about a liberalization of the domestic rules of Contracting States so as to permit bulk and future receivables financing, the ultimate effectiveness of such assignments against third parties, including insolvency administrators, will still be dependent on the national priority policies of the assignor's home State.

VI. Choice of Law for Formal Validity of Contracts of Assignment

The preceding discussion sheds some light on the issue of the choice of law to govern the formal validity of a contract of assignment. Because the contract of assignment is usually the vehicle by which the assignment itself is effected, legal systems often prescribe special formality requirements, especially where the assignment operates by way of security. In some cases, compliance with the relevant formality is a precondition even to the *inter partes* effectiveness of the assignment.[102] In other legal systems,

102. This is the rule of U.C.C. article 9 under which the contract effecting or evidencing the assignment must be reduced to a writing signed by the assignor and containing a description of the assigned receivables for the assignment itself to become effective. *See* revised U.C.C. article 9§-203(b)(3)(A). It is also the approach taken by the Civil Code of Quebec (CCQ) in the case of hypothecary assignments, that is to say, an assignment of receivables by way of security. Article 2696 of the CCQ requires a security assignment to be granted in writing and signed by the parties, on pain of absolute nullity. Moreover, the writing must contain a description of the receivables and indicate the maximum $ sum secured by the security right.

compliance with the relevant contract formality is necessary only for the purposes of third party effectiveness of the assignment.[103]

These differences indicate that formal requirements may be intended to perform multiple functions, relevant to both the *inter partes* and third party contexts, depending on the particular legal regime and its policy concerns. As between the parties, a formality rule may be designed to protect the assignor by bringing home the seriousness of the undertaking. Or it may be aimed at minimizing future disputes between the parties as to the scope of the receivables covered by the assignment.

As regards third parties, especially third party creditors, a writing requirement or other contract formality, e.g., a notarial instrument, may be intended to operate as a prophylactic against the heightened risk of fraudulent collusion which exists with oral assignments, either in the form of a collusive antedating of the assignment, or collusion as to the true scope of the receivables assigned. In systems in which priority is ordered according to a simple first in time rule, formality rules may also function to establish a "certain date" for the ranking of competing assignments, thereby avoiding a waste of judicial resources on resolving difficult evidentiary issues. Other formality rules, e.g., a requirement to specify the value or maximum value of the secured obligation in the context of a security assignment, may be aimed at limiting the value of the assignee's priority as regards competing claimants, thereby also limiting that assignees's monopolistic position in the provision of credit to the debtor.[104] The same is true in respect of formalities rules that require specification of the assigned debts in a written document to the extent that such rules are intended to ensure that a certain level of future receivables will remain free to satisfy unsecured creditor claims.

Because the purpose of formality rules thus includes the protection of third parties in the position of competing creditors, it follows that such rules may also partake of the character of priority rules. As such, they should logically be referred to the law applicable to priority.

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103. For instance, the Canadian Personal Property Security Acts require the contract of assignment to be signed by the debtor and to describe the assigned receivables only in order for the assignee's property interest in the receivables to take effect as against third parties. As between the parties, an assignment can be effected via a purely oral agreement. *See*, e.g., British Columbia PPSA §§ 10, 12(1)(c).

104. This is the approach taken in the Civil Code of Quebec, *supra* note 102.

How does the Convention accommodate the diverse nature of formality rules, and their diverse purposes? Article 27 of Chapter V adopts a relatively flexible and facilitative choice of law rule in line with the approach taken generally to contact formalities in the Rome Convention. If the contract is concluded between parties located in the same State, it is formally valid if it meets the form requirements of its proper law or of the law of the state in which it is concluded. If the parties are resident in different states, the contract is formally valid as long as it conforms either to its proper law or to the law of either of the States in which the parties are located.

However, article 27 is explicitly confined to issues of formal validity where they arise as between the parties. It follows that even if the contract is formally valid under one or another of the laws designated as applicable, the assignment itself may still be ruled invalid for failure to comply with the formality rules of the law of the assignor's location to the extent these requirements are interpreted as [also] relating to priority.

VII. Law Applicable to the Characterization of "Assignments" as Sale or Security

The term "assignment" is not uniformly understood. In some legal systems, it designates an outright sale of the relevant receivables, as distinct from their hypothecation as collateral for secured debt. In others, it encompasses all transactions intended to vest real rights in receivables in another, whether by way of ownership or merely security. In still others, it refers merely to the form of the transaction, not its substantive character.

The Convention uses the term assignment to cover both the transfer of and the creation of rights in receivables as security.[105] It follows that the Convention conflicts regime applies to both types of transaction. This is appropriate. There is no rational reason to have a different choice of law rule for each. Indeed, such a distinction would make the conflicts regime unworkable from the point of view of both the debtor and competing claimants. They would be forced to investigate and seek legal advice on the substantive nature of the assignment in order to know what law governed their rights *vis à vis* the assignee. Moreover, priority between competing assignments, one by sale and the other by

105. *See* UNCITRAL Convention article 2(a).

security, would end up being governed by different laws, leading to an impasse.

This is not to say that the nature of the transaction is irrelevant in applying the choice of law rules of the Convention. The distinction between sale and security determines the extent of the assignee's interest in the assigned receivable against the assignor. An assignor who has sold its receivables outright has no further claim to them, whereas one who has assigned them merely as security, is entitled to any value left once the underlying secured debt has been paid. This indirectly affects priority, insofar as characterization determines the *quantum* of the priority right enjoyed by the assignee under the applicable national law against competing claimants. It is for this reason that the Convention defines the scope of the "priority" issues governed by the law of the assignor's location to include the determination of whether or not the assignment is a security right for a debt or other obligation.[106]

VIII. Choice of Law for Assignee and Debtor Relations

A. Introduction

Chapter V of the Convention also deals with the appropriate law to govern relations between the assignee and debtor.[107] Even if the assigned receivable can be conceived as property in the hands of the assignor as against the assignee, the contractual relationship between the assignor and debtor continues to exist after the assignment. This requires a choice of law solution which protects the debtor against undue prejudice to his or her original contractual rights and obligations, without unduly impeding the assignee's expectations of payment, thereby undermining the ability of creditors to secure optimal value for their receivables.

Historically, there was considerable debate among conflicts analysts as to the most appropriate connecting factor to satisfy these competing tensions.[108] Opinion was divided between the law of the domicile of the original creditor on the debt (that is, the assignor) and the law of the domicile of the debtor. Neither alternative seems quite satisfactory since each ends up favouring exclusively one or the other of the parties to the original contract. To give a greater appearance of objectivity to the choice of the

106. UNCITRAL Convention article 5(g).
107. *See* UNCITRAL Convention article 29.
108. *See, e.g.*, Batiffol, *supra* note 3.

debtor's domicile, it is sometimes argued that it reflects the notional *lex situs* of the debt since this is the place where any action to enforce the debt will often have to be taken as a practical matter.[109] On the other hand, one might just as logically argue that the notional *lex situs* of the debt is the original creditor/assignor's location. After all, many legal systems, in the absence of an express term, regard the place of payment as being the creditor's location on the theory that a debtor is impliedly obligated to seek out the creditor.

Today, application of the law governing the assigned obligation is generally thought to be the approach that best reflects the interests of the concerned parties. This is the rule endorsed by article 29 of Chapter V of the Convention, following the general lead of article 12(2) of the Rome Convention. However, whereas the Rome Convention refers to "the law governing the receivable to which the assignment relates," article 29 of the UNCITRAL Convention more precisely speaks of the law governing the original contract between the assignor and the debtor. Greater linguistic precision is possible because, unlike the Rome Convention, the UNCITRAL Convention applies only to contract-generated receivables.[110]

Application of the proper law of the original contract is fair to the debtor because it ensures that the debtor's original rights and obligations can be changed by the assignment only to the extent permitted by the law under which the debtor undertook those rights and obligations. And it does not unduly undermine the assignor's ability to market the debt to prospective assignees since, from the latter's perspective, the law governing the original contract is foreseeable at least in the context of an assignment of presently owed or specifically identified receivables. As for bulk assignments and assignments of future receivables owing by future unknown debtors, predictability can be enhanced by virtue of an arrangement between the assignor and assignee requiring the assignor to include a choice of law clause in its contracts with its debtors and to warrant the governing law in respect of all such contracts.

109. *See, e.g.*, Moshinsky, *supra* note 3.
110. UNCITRAL Convention article 2(a).

B. Relationship Between Article 29 and the Territorial Scope Rules of the Convention

Article 29 is fairly explicit as to the issues falling within the scope of the law governing the original contract: the effectiveness of contractual limitations on assignment as between the assignee and debtor, the relationship between the assignee and the debtor, the conditions under which the assignment can be invoked against the debtor, and any question relating to whether the debtor's obligations have been discharged.[111] Most of these issues are the subject of a uniform substantive rule in the preceding articles of the Convention.[112] If follows that the role of article 29 is quite limited as a supplementary gap filling technique for assignments which fall within the overall scope of the Convention.

However, it will be recalled that even if the assignor is located in a Contracting State, the substantive provisions of the Convention as they relate to the debtor are triggered only if the debtor is also located in a Contracting State or the law governing the original contract is the law of a Contracting State.[113] This latter connecting factor may enable an assignee who wishes to ensure that the substantive rules of the Convention apply to a debtor who is not located in a Contracting State to indirectly achieve that result by requiring the assignor to include an express choice of law clause in the original contract in favour of the law of a Contracting State. This technique may not, however, be completely reliable if the litigation is heard in the debtor's home jurisdiction. The courts of a non-contracting State are not of course bound by the Convention and may not be prepared to interpret the contractual reference in the original contract to the law of a Contracting State as a reference to that State's Convention rules as opposed to its purely domestic rules. Even if this interpretive hurdle is surmounted, forum public policy and forum super-mandatory rules may be invoked to reject application of the substantive rules of the Convention rules as they relate to such controversial issues as nullification of the effects of an anti-assignment clause as between the assignee and debtor.

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111. UNCITRAL Convention article 29.

112. *See generally* UNCITRAL Convention Chapter IV, Section II, comprising articles 15-21.

113. UNCITRAL Convention article 1.3. And *see* text *infra* under the sub-heading "Scope of Application of the Conflicts Rules of the Convention."

C. *Preservation of Overriding Consumer Protection Norms of the Debtor's Home State*

The substantive provisions of the Convention as they relate to the debtor are subject to the express preservation of any applicable consumer protection norms. The Convention contains an omnibus provision preserving the effectiveness of consumer protection laws governing the protection of a debtor under consumer protection laws, i.e., laws governing the protection of the parties to transactions made for personal, family or household purposes.[114] So, for instance, notwithstanding that the Convention validates the effect-iveness of a waiver by the debtor of defences or set-off rights available under the original contract,[115] this will be subject to any applicable consumer protection laws nullifying the effects of such a waiver.

The law governing the original contract presumably governs the question of whether or not a particular consumer protection norm applies so as to override the substantive provisions of the Convention. Does this mean that consumer protection norms enacted by the state in which the debtor is located can be evaded by inserting a choice of law clause in the original contract in favour of a less protective legal regime? To allow this would nullify the policy underpinning the explicit preservation of consumer protection laws. Two theories can, and likely will be, invoked to avoid that result. First, in light of the general principle of consumer protection articulated in the Convention, the forum court may well interpret the reference to the "law governing the original contract" as requiring an objective reference, in the case of a contract involving a consumer debtor, to the most-closely connected law, as opposed to giving full effect to party autonomy.[116] Alternatively, even if the choice of law clause is given presumptive effect, the court may still appeal to those provisions of Chapter V which preserve the super-mandatory norms of the forum or a closely connected third state to override the otherwise applicable law.[117]

114. UNCITRAL Convention article 4.4.
115. UNCITRAL Convention article 19.
116. *See* the interpretation principles in article 7.2.
117. UNCITRAL Convention article 31.

D. Law Applicable to Debtor's Set-off Rights

Does the law governing the original contract also determine the availability to the debtor of set-off rights and defences as against the assignee? The question is important because, on the matter of set-off, the substantive provisions of the Convention do not supply an exhaustive code. It follows that the choice of applicable national law may be relevant even in respect of assignments within the direct scope of the Convention.

In exploring this question, it is useful to distinguish between what is sometimes called transaction set-off and independent set-off.[118] Transaction set off is a cross-claim arising out of the same transaction or one so closely related that it operates as a complete or partial defeasance of the plaintiff's claim. Independent set-off, as its name suggests, does not require any relationship between the transactions out of which the cross claims arise.

Under the substantive provisions of the Convention, transaction set-off—defined as defences and rights of set-off arising from the original contract, or any other contract that was part of the "same transaction"—is available to the debtor in a claim for payment of the receivable by the assignee to the same extent as if the claim had been made by the assignor.[119] In other words, it makes no difference whether the defence or set-off right arose before or after the debtor received notification of the assignment. In contrast, independent set-off—referred to in the Convention simply as "other rights of set-off"—may be raised against the assignee only if the right was "available" to the debtor at the time notification of the assignment was received.[120]

The approach taken by the Convention to transaction set-off reflects a widely-shared consensus at the national law level.[121] Nonetheless, the rule does not dispense with the need to resort to national law. Recourse to national law will still be necessary to determine what substantive defences and rights of set-off are available to a debtor by way of transaction set-off, and to determine when a related contract is considered to be sufficiently connected to the original contract to constitute part of the "same transaction"

118. *See, e.g.*, PHILIP WOOD, TITLE FINANCE, DERIVATIVES, SET-OFF AND NETTING 101, 110 (London: Sweet & Maxwell, 1995).
119. UNCITRAL Convention article 18.1.
120. UNCITRAL Convention article 18.2.
121. *See* Kötz, *supra* note 37, at 89-91.

and therefore qualify for transaction set-off. But which national law?

The choice of law rule for assignee-debtor relations in article 29 of Chapter V does not explicitly cover set-off issues, and this silence was deliberate. Nonetheless, transaction set-off is arguably covered as an aspect of "the conditions under which the assignment can be invoked against the debtor." Although the conflicts literature on set-off is sparse, at least one commentator considers this to be the result intended by art 12(2) of the Rome Convention from which article 29 is derived.[122] As a matter of logic and policy, it is difficult to see what law other than the law governing the original contract should govern defences and cross-claims arising under that contract and any related transactions.

The appropriate law to govern the availability of independent set-off rights is more problematic. The choice of law issue is important in view of the significant absence of uniformity at the substantive law level among different legal systems on such issues as the pre-conditions to the availability of independent set-off (must the debt have become payable before notification or is it sufficient for the claim to have accrued?) and the manner in which set-off is exercised if by self-help (e.g., automatic or by declaration).[123]

It has been suggested that in principle, the question of whether a claim may be discharged by independent set-off should be governed by the law of the claim which the debtor asserts has been discharged by set-off.[124] Application of the law of the primary claim, it is argued, would confer some measure of predictability of result where one law allows set-off and the other does not. In the context of a claim by the assignee against the debtor, this would lead to application of the law governing the original contract.

In the view of others, such a choice of law rule would be unfairly arbitrary. By definition, independent set-off comes from an independent transaction or event which may have a different governing law than that which governs the primary claim under the original contract, and which may regulate the conditions for the availability of set-off in a different fashion than would the law governing the original contract. The only fair way to accommodate this duality in governing laws, it has been suggested, is to apply a cumulation of laws, i.e., independent set-off should be available

122. *See* WOOD, *supra* note 118, at 145.
123. *See* Kötz, *supra* note 37, at 91-92; WOOD, *supra* note 118, at 143.
124. *See* WOOD, *supra* note 118, at 144.

only to the extent it is available under both the law governing the primary claim and the law governing the independent cross-claim.[125]

E. Effectiveness of Assignments Contrary to a No-Assignment Clauses

Under the Convention, an assignment is fully effective even if a term in the original contract purports to prohibit or restricts its assignment (an anti-assignment clause). The debtor retains a right of action against the assignor for breach of the term, but the assignment itself is valid, both as between the parties, and as against the debtor.[126]

The approach taken by the Convention is not without controversy. A debtor may have sound commercial reasons for incorporating an anti-assignment clause in the contract. Yet if such clauses were rigorously enforced, this would deprive businesses—particularly small and medium sized businesses without sufficient bargaining power against economically stronger customers—to use what may be their most valuable assets to raise credit or capital.

These competing tensions have lead to wide variations in legal systems on the appropriate treatment of anti-assignment clauses.[127] In some, the statutory policy is broadly similar to the Convention.[128] In others, an assignment in breach of an anti-assignment clause is still valid as between the parties, but cannot be enforced by the assignee directly against the debtor.[129] In still others, the anti-

125. *Id.* at 144.

126. *See* articles 9, 10.2-3. Article 18.3 further confirms that breach by the assignor of an anti-assignment clause does not constitute a defence or give rise to a right of set-off if the assignee claims payment of the receivable from the debtor.

127. *See* Kötz, *supra* note 37, at 64-70.

128. In Canada, this is the general rule under the Personal Property Security Acts except for the Ontario PPSA: *see, e.g.*, section 41(9) of the Saskatchewan PPSA and section 41(10) of the New Brunswick PPSA. The rule is justified as necessary to facilitate receivables financing, In France, anti-assignment clauses are thought to be invalid, not so much in the interests of supporting access to commercial credit, but as contrary to the long-standing strong French public policy against restraints on the alienation of property. Italian law takes the same approach. *See* Kötz, *supra* note 37, at 64-65.

129. This is the current position in the Canadian province of Ontario. *See* Rodaro v. Royal Bank of Canada [2000] [QL] O.J. 272, approving *Yablonski v. Cawood* (1997), 143 D.L.R. (4th) 65 at 76 (Sask. C.A.) (which held that even if a contract contains a prohibition on assignment, the assignment would still be effective as between assignor and assignee; such a prohibition merely prevents the assignee from having direct recourse against the non consenting party to the assigned contract). However, the Canadian Bar Association—Ontario Branch recently recommended amendments designed to bring Ontario policy into conformity with the more liberal policy found in the other PPSAs on this point.

assignment clause nullifies the effectiveness of the assignment not just as against the debtor but also between the assignee and competing third party claimants (despite the fact that such a contractual term is clearly aimed only at the protection of the debtor).[130]

In light of this controversy, the scope of the provisions of the Convention nullifying the effects of assignment clauses is limited to assignments of what might loosely be called ordinary trade receivables.[131] It follows that the effects of an anti-assignment clause in the case of other assignments will instead be determined by the law governing the original contract pursuant to article 29.

Article 29 may also have a role to play even in cases where the assignment itself falls within the scope of the substantive anti-assignment clause provisions of the Convention. If the application of the Convention has not also been triggered as against the debtor,[132] these provisions will only operate to ensure that the assignment takes effect as between the assignor and assignee. They cannot deprive the debtor of the benefit of any protection which the law governing the original contract offers pursuant to the choice of law rule in article 29. Article 29 is concerned with the assignee's rights against the debtor, the aim being to protect the debtor against an involuntary change in the law regulating those rights. It follows that if the contract under which the receivable arises contains a prohibition on assignment, and the law governing that contract entitles the debtor to ignore the assignee's title or security interest under a subsequent assignment in breach of that prohibition, then the debtor should be able to invoke the protection of that law, regardless of what the law governing the contract of assignment may say.[133]

See Submission to the Minister of Consumer and Commercial Relations Concerning the Personal Property Security Act 19-20 (Toronto: Canadian Bar Association—Ontario, 21 Oct 1998). In the civil law province of Quebec, the position is uncertain. The validity and effects of anti-assignment clauses are not addressed explicitly in the Civil Code. However, some analysts believe that an assignment in breach of an anti-assignment clause would be valid, not only as between the assignor and assignee and as against third parties but also against the debtor, by virtue of the general codal articles which limit the effectiveness of stipulations which attempt to restrict the free alienation of property rights by contract. *See* articles 1212-1217.

130. This is the general rule in German, Swiss and Austrian law. *See* Kötz, *supra* note 3, at 65-67.

131. UNCITRAL Convention articles 9.3, 10.4.

132. UNCITRAL Convention article 1.3. And see the text under the sub-heading "Scope of Application of the Conflicts Rules of the Convention" *supra*.

133. *See* GOODE, *supra* note 3 and Moshinsky, *supra* note 3 who make this

For assignments falling wholly outside the Convention, article 29 will also determine the choice of law to govern the assignee's rights as against the debtor in the face of an anti-assignment clause. However, the debtor may also be able to rely on the law governing the contract of assignment, pursuant to the choice of law rule in article 28. If that law treats an assignment in breach of an anti-assignment clause as a complete nullity even as between the parties, then surely it is also a nullity as against the debtor, even where the debtor's own law is less protective.

F. Statutory Prohibitions or Restrictions on Assignments

Issues relating to the effectiveness of an assignment, between the parties and against third parties may also arise as a result of a statutory prohibition on the assignment of certain classes of receivables, e.g, future wages, pension entitlements, or family maintenance payments owing to individual debtors, or payments due under life insurance policies. Article 12(2) of the Rome Convention refers issues of "assignability" to the law governing the receivable and at least some analysts regard this as including issues of assignability stemming from statutory restrictions. There are, however, logical difficulties with that assumption. If the law regulating the assignee's right to the receivable against the assignor prohibits the assignment, then surely the assignee has no right to the receivable against the debtor.

Happily, article 29 does not incorporate the confusing term "assignability," and the Convention elsewhere explicitly confirms that it is not intended to affect limitations on assignment arising from law.[134] This is appropriate. Most statutory prohibitions on assignment are directed at the protection of the *assignor* or the assignor's family, rather than the *debtor*. Consequently, their territorial scope of operation would normally be limited to cases involving an assignor resident within the enacting jurisdiction. It follows that issues of assignability arising from the effect of statutory prohibitions on assignment would normally be covered by the choice of law governing the *in rem* effect of the assignment as between the assignor and assignee without ever getting to the choice of law issue covered by article 29 which is concerned with the rights of the assignee under a *valid* assignment against the debtor.

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point in the context of the equivalent rule in article 12(2) of the Rome Convention.

134. UNCITRAL Convention article 8.3.

IX. Concluding Observations

On the whole, the choice of law rules of the Convention respond exceedingly well to contemporary currents of private international law opinion in the light of commercial needs. This is most dramatically seen in the designation of the law of the assignor's location as the governing law for issues relating to the priority of the assignee's interest against competing claimants, a rule crafted to accommodate modern financing practices where bulk assignments of present and future receivables are commonplace.

The Convention nonetheless leaves open some areas of uncertainty, perhaps inevitably. The issue of what law governs the proprietary effectiveness of an assignment is most problematic in this regard. From a pure choice of law perspective, the optimal solution would be to subject the property aspects of an assignment to the same law that governs priority. This is because, while priority in the usual sense presupposes a valid assignment, the issues of validity and priority are not so neatly separated in many legal systems. Instead, the constitutive rules for a valid assignment often incorporate elements aimed at the protection of both the immediate parties and third parties, making it conceptually difficult to cleanly separate the issues at the level of choice of law, and objectionable to do so at the level of policy.

For assignments falling within the direct scope of the Convention, however, such a separation is necessary. This is because the Convention combines a substantive rule validating the effectiveness of assignments of multiple and future receivables with a choice of law rule for issues of priority. Consequently, Contracting States, if confusion is to be avoided, will need to ensure that their domestic laws on the effectiveness of such assignments are liberalized to an equivalent degree. Otherwise their courts will be left with the difficult task of having to deconstruct the priority rules of the assignor's location to determine whether or not they are overridden as indirectly impeding such assignments.

So, while the decision to adopt a choice of law solution to the issue of priority was taken so as to avoid interference with domestic priority policies, some interference was inevitable to accommodate the consensus among Commission members on the wisdom of endorsing the free assignability of the full range of present and future receivables owing to an assignor. However, the interference is minimal. The state in which the assignor is located remains free to impose whatever level of policy restrictions on the priority or

distributive effects of assignments of future and multiple receivables are feel to be necessary to protect competing assignees and the assignor's creditors. All that is required is that the rule be expressed in a way which avoids the *a priori* invalidation of such assignments.

Designation of the assignor's law to control priority represents a partial return to an earlier era of globalized trade in which commercial transactions involving movable assets wherever located were referred to a single governing law, that of the domicile of the owner, the assignor in this context.[135] We are not likely, however, to see the assignor's law resurrected to any equivalently comprehensive extent. While the Convention covers most types of contract-generated receivables, it excludes a number of commercially important categories, including bank deposits and receivables arising out of investment securities and other financial assets or instruments held with an intermediary.[136] The question of whether and why a different specialized choice of law rule may be needed for these excluded categories is the subject of another article. What is important is that the UNCITRAL Convention has established the assignor's law as the baseline rule for choice of law in intangibles, shifting the burden of proof to those who wish to advocate any deviation from the single governing law theory for global assignments which underpins the rule.

135. As reflected in the quote from the 1795 English decision in *Phillips v. Hunter* reproduced at the beginning of this article: see above footnote 1.

136. UNCITRAL Convention article 4.2.